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JAMES R. BROWNING

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 520

HOLLAND FURNACE COMPANY,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

STUART S. BALL,
RICHARD J. FLYNN,
11 South La Salle Street,
Chicago 3, Illinois,

ROBERT H. TRENKAMP,
R. D. BOVINGTON,
EDWARD A. McLEOD,
1675 Union Commerce Building,
Cleveland 14, Ohio,
Attorneys for Petitioner.

SIDLEY, AUSTIN, BURGESS & SMITH,
TRENKAMP & COAKLEY,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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FEDERAL TRADE COMMISSION,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on June 16, 1959, denying petitioner's motion to enter a decree setting aside, on jurisdictional grounds, the Final Order of the Federal Trade Commission dated July 7, 1958.

CITATIONS TO OPINIONS BELOW.

The opinion of the Federal Trade Commission is unreported, and is set forth at pages 59-65 of the Appendix printed for the court below[1] and certified as part of the

1. Hereinafter referred to as "C. A. Appendix."

record therein, nine copies of which are filed herewith. The opinion of the Court of Appeals is reported in 269 F. 2d 203, and is printed in Appendix A, *infra*, p. 17.

JURISDICTION.

The judgment of the Court of Appeals sought to be reviewed was dated and entered June 16, 1959, and is printed in Appendix B, *infra*, p. 35. A timely Petition for Rehearing was denied on August 14, 1959, Appendix B, *infra*, p. 36.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1). Petitioner's Petition for Review of the order of the Federal Trade Commission complained of has been properly docketed in the Court of Appeals. On motion of petitioner, the Court of Appeals has entered an order disposing of the jurisdictional issues herein, upon which order this Court may pass. *Ickes* v. *Associated Industries of New York State*, 319 U. S. 739, 320 U. S. 707 (reported below at 134 F. 2d 694).

The reasons justifying this Court's exercise of its jurisdiction in this proceeding are set forth at pages 13 through 14, *infra*.

QUESTION PRESENTED.

Whether the activities of petitioner's local salesmen in the house-to-house solicitation of contracts for the sale of household warm air heating systems to be fabricated and installed in the customers' homes out of parts and materials maintained in local warehouses, situated in the state of sale, are activities "in commerce" within the jurisdiction of the Federal Trade Commission under § 5 of the Federal Trade Commission Act simply because these parts and some of the materials had been manufactured in another state by petitioner and shipped to the local warehouses in bulk prior to the solicitation of the contracts.

STATUTES INVOLVED.

The provisions of the Federal Trade Commission Act involved herein are § 4 and subparagraphs (1) and (6) of § 5 (a), 15 U. S. C. § 44, § 45 (a) (1) and (a) (6), which provide:

> "(1) Unfair methods of competition *in* commerce, and unfair or deceptive acts or practices *in* commerce, are hereby declared unlawful."[2]
>
> * * *
>
> "(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations, * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."
>
> * * *
>
> "'Commerce' means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation."

2. Italics within quoted matter have been added by petitioner unless otherwise noted.

STATEMENT OF THE CASE.

Petitioner's operations include two distinct types of activities:

(a) the manufacture of parts for household warm air heating systems, and

(b) the negotiation and carrying out of contracts with home owners for the installation of complete or partial heating systems or for the repair of existing systems.

Petitioner's manufacturing facilities are all located at Holland, Michigan. It maintains sales offices and connecting warehouses in cities and towns in 44 states. Petitioner maintains stocks of parts in local warehouses, replenishing these stocks from time to time by bulk shipments from its factory at Holland.

Sales personnel located at petitioner's local sales offices solicit contracts from house to house in the area in which the particular office is located. The materials and parts (*e.g.*, castings, pipes, registers, controls, sheet metal, lumber, etc.) used in performing these contracts are drawn from the stocks maintained in the local warehouses.

Parts are not shipped from Holland to the local offices or warehouses to carry out particular contracts. Parts are not shipped from Holland to customers. Each sale results from the individual efforts of a local salesman, and the installation is made almost immediately from the stock of goods on hand in the local warehouse. The contracts do not call for uniform installations; each installation is tailor-made to suit the requirements of the particular structure and the specific customer.

On May 4, 1954, the respondent, Federal Trade Commission, commenced an adversary proceeding against petitioner under § 5 of the Federal Trade Commission Act, charging that petitioner, in the sale of its heating systems,

employed unfair and deceptive acts and practices in commerce and unfair competition in commerce.

On June 23, 1954, petitioner answered the Commission's complaint denying, among other things, that the acts and practices charged had occurred in commerce within the intent and meaning of the Federal Trade Commission Act, and alleging that the transactions to which the charges related "were purely local in character and were not transactions in commerce within the intent and meaning of the Federal Trade Commission Act."[3]

On October 22, 1957, the Hearing Examiner rendered his Initial Decision and entered an order to cease and desist. On July 7, 1958, the Commission affirmed, filed an opinion adopting the findings, conclusions and order contained in the Initial Decision as its own, and entered a Final Order[4] directing petitioner to cease and desist from certain activities in connection with the local solicitation and making of contracts for the installation of household heating systems.

The Commission found that petitioner manufactures furnaces, heating equipment and parts therefor,[5] which it sells to the ultimate purchasers and users thereof[6] through salesmen or house-to-house canvassers; that petitioner owns and operates approximately 475 branch offices, or retail outlets, as well as a number of sub-branches, located in various states of the United States[7], which are supplied with essential parts from branch warehouses connected with the branch, or from central warehouses strategically

3. C. A. Appendix, pp. 11, 12. Petitioner also denied the commission of the alleged acts and practices.

4. C. A. Appendix, p. 58.

5. C. A. Appendix, pp. 60, 72.

6. *Ibid.*

7. *Ibid.*

located[8], to which the essential parts have been shipped by petitioner after manufacture by it in Holland, Michigan[9]; that furnaces and heating systems sold by petitioner are assembled either in its warehouses or branches, or "on the job,"[10] and are installed by petitioner's employees[11] in the customers' homes.

The Commission did *not* find that petitioner's shipments of materials and parts to its local warehouses were made pursuant to prior contracts between petitioner and its customers. It did *not* find that shipments were made to supply the expected or anticipated need of any particular customer or customers. It did *not* find a continuous flow of the petitioner's products from its factory in Michigan to customers in the various localities in which it does business.

Although the Commission did find that, in certain specified instances, sales had been made across state lines and within the District of Columbia,[12] the Commission did *not* find that any of the condemned activities had occurred in connection with these specified and sporadic sales.

In the court below, petitioner, having filed a timely petition for a review of the Commission's order, filed a Motion for Determination of Jurisdictional Issues in Advance of Hearing on Merits, pursuant to Rule 15 (f) of the Rules of the court below. This motion asked the court to hear and consider a motion to set aside the Commission's order on the grounds that the findings of the Commission not only failed to sustain the jurisdiction of the Commission to order petitioner to cease and desist from the practices

8. C. A. Appendix, pp. 60, 73.
9. *Ibid.*
10. C. A. Appendix, p. 73.
11. C. A. Appendix, p. 77.
12. C. A. Appendix, pp. 74, 75.

condemned, but, on the contrary, affirmatively established that the acts and practices condemned had occurred in *intrastate* commerce.

The court below granted the motion for a preliminary determination of the jurisdictional issues. The court heard and considered petitioner's motion to set aside the Commission's order on jurisdictional grounds, and, overruling petitioner's motion, entered a judgment[13] sustaining the jurisdiction of the Commission and filed an opinion in support thereof.[14]

The court below correctly *stated* the extent of the Commission's jurisdiction, citing this Court's opinion in *Federal Trade Commission* v. *Bunte Bros., Inc.*, 312 U. S. 349, and its own earlier opinion in the same case (110 F. 2d 412):

> "The only practices with which the Commission may concern itself are transactions 'in interstate commerce.' * * * The words, the meaning of which we are to construe, are definitely 'in commerce' not 'affecting commerce.'" (App. A, p. 25.)

It then held, however, that "the *local* sales by Holland through its own employees, filled from Holland's warehouses to which its products were shipped in interstate commerce *prior* to such sales, have such *close and substantial relation to interstate commerce* as to bring them within the regulative powers and jurisdiction of the Federal Trade Commission" (App. A, p. 33).

In reaching its decision, the Court of Appeals also concluded that, because there would be no interstate shipments of parts for heating systems without local sales, the local sales efforts were "in commerce whether such sales efforts occurred *before or after* the products to which they related

13. Appendix B, *infra*, p. 35.
14. Appendix A, *infra*, pp. 17-33.

had been warehoused in the state where sold and distributed" (App. A, pp. 28, 26-27).

The holding of the court below that the activities of Holland's local salesmen are in commerce rests on two grounds:

1. That the activities of petitioner's local salesmen affected interstate commerce.

2. That the materials and parts shipped by petitioner to its warehouses, which they sold, continue in interstate commerce beyond the warehouses and until they "rest finally in the possession of the purchaser or ultimate consumer."

A timely petition for rehearing[15] was filed, and denied by the Court below on August 14, 1959.[16] It is to review the judgment on the motion challenging the Commission's jurisdiction, that this petition for a writ of certiorari is filed.

Pending this Court's decision upon this petition, the court below has deferred further proceedings.[17]

REASONS FOR GRANTING THE WRIT.

1. The decision of the court below is directly in conflict with the decision of this Court in *Federal Trade Commission* v. *Bunte Bros., Inc.*, 312 U. S. 349.[18]

Bunte Bros. said very clearly that the jurisdiction of the Federal Trade Commission extends only to transaction-

15. Certified as a part of the record below, nine copies of which are filed herewith.

16. Appendix B, *infra*, p. 36.

17. Appendix B, *infra*, p. 37.

18. The decision of the court below is also contrary to the holding of this court in *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, 646 and *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, 216.

in commerce and not to transactions which merely *affect commerce*; and that the Congress has not endowed the Commission with the full scope of its constitutional power over commerce. The court below says that the *Bunte Bros.* decision must be limited to the peculiar facts upon which the question there arose; that, except where the acts and practices in question relate to goods "which had been at no time in interstate commerce," *Bunte Bros.* does not apply; and that the jurisdiction of the Commission, extending to the full limit of the federal power, includes activities in intrastate commerce which affect interstate commerce. Contrary to the view of the court below, *Bunte Bros.* did not turn upon whether the goods to which the acts there related had, or had not, been sometime in commerce, and cannot be made to do so.

The Court of Appeals while correctly stating the statutory limitations of the Commission's jurisdiction, in fact ignored these limitations and extended this jurisdiction to matters which are not *in* commerce, but which merely *affect* commerce. Thus, while the Court of Appeals stated as its conclusion that the "work of Holland's salesmen and servicemen • • • is in commerce," it based this conclusion entirely on the determination that this local work had some *relation to* and an *effect upon* the interstate transportation of the parts manufactured by Holland.

Thus, the Court of Appeals said:

> "Without the sales, deliveries and installations made by Holland salesmen and servicemen from its own warehouses its interstate business would cease. With those sales, deliveries and installations and measured by them, Holland has a continuous interstate business reaching into forty-four states."[19]

19. App. A, *infra*, p. 28.

It then quoted from *Ford Motor Co.* v. *Federal Trade Commission*, 120 F. 2d 175 (C. A. 6), cert. den. 314 U. S. 668, as follows:

> "All of those things which *stimulate* or *decrease* the flow of commerce, although *not directly in its stream*, are essential *adjuncts* thereto and the Congress has power to confer on the Federal Trade Commission their regulation."

It concluded its opinion by saying:

> "* * * it seems plain that the *local* sales by Holland through its own employees, filled from Holland's warehouses to which its products were shipped in interstate commerce *prior* to such sales, have such a close and substantial *relation* to interstate commerce as to bring them within the regulative powers and jurisdiction of the Federal Trade Commission."[20]

2. The decision below, while recognizing that "the Commission has cited no authority precisely in point" to sustain its jurisdiction, failed to follow the decisions of this Court which are precisely in point and distinguish between (1) transactions relating to goods which have once moved in interstate commerce which transactions are themselves in commerce, and (2) transactions relating to goods which have once moved in commerce which transactions are local and not in commerce. The decision below is thus in conflict with *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, and *Higgins* v. *Carr Bros. Co.*, 317 U. S. 572, which hold that the arrival of an interstate shipment of goods at a warehouse to which the goods have been shipped with the intention that they there remain until disposed of in intrastate commerce, terminates the interstate character of the shipment, and that subsequent local activities relating to the goods are in intrastate commerce.

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20. App. A, *infra*, p. 33.

The court below held, however, that the parts and materials shipped by petitioner to its warehouses in interstate commerce continued in commerce through petitioner's warehouses and until finally fabricated and installed as heating systems in the homes of the purchasers. The court made this determination despite the fact that there was no finding by the Commission of a "practical continuity in transit" of the parts and materials from Holland, Michigan through petitioner's warehouses and on to its customers, nor any finding that, after arrival at petitioner's warehouses, "the goods in question were different from goods held by a local merchant for local disposition." *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 569, 570.

So far as can be ascertained from its opinion, the Court of Appeals reached its conclusion solely because it found no "logical point" at which interstate commerce ceased because Holland shipped from its own factory to its own warehouses, and the subsequent sales were made by its own employees (App. A, pp. 27-28). These facts afford no ground for the Court of Appeals' departure from the normal application of the standards enunciated by this Court which clearly define that "logical point", or for its extension of the jurisdiction of the Commission beyond the limits of the statute. In *Domenech* v. *Pan American Standard Brands*, 147 F. 2d 994 (C. C. A. 1, 1945), the court followed and applied this Court's decisions in *Jacksonville Paper* and *Carr Bros.*, even though the out-of-state manufacturer owned and operated its own local warehouses, stating at page 997:

> "Here the extra-state manufacturer or supplier maintains a branch within the state (the territory of Puerto Rico here) from which goods are sold direct to the consumer through 'salesmen.' The needs of the branch are determined on the ground by checking sales against inventories on the basis of which orders are then placed with the New York office. Goods are reg-

> ularly shipped according to order to Puerto Rico where they are stored in a number of warehouses and intermingled with the general mass of goods on hand * * *.
>
> On the facts of this case we are of the opinion that there is a substantial break in the movement of the products involved here at the warehouse to warrant dividing the commerce involved into its interstate and intrastate phases. As we view the case, it seems clear that the intended terminal point of the interstate journey was the warehouse and not the consumer."

The only authorities cited by the Court of Appeals in this case for its novel decision are *Standard Oil Co.* v. *Federal Trade Commission*, 340 U. S. 231, and *Ford Motor Company* v. *Federal Trade Commission*, 120 F. 2d 175 (C. A. 6, 1940)—each of which it conceded was neither "precisely in point" nor "completely authoritative in support of the Commission's jurisdiction" (App. A, pp. 29-30). In point of fact, neither case supports the Commission's jurisdiction in this case in any way.

The finding in the *Standard Oil* case that the deliveries of oil to Standard's bulk plants did not terminate its movement in commerce rested on the fact that there existed a regular market for the oil with identifiable customers whose anticipated needs were known, and on the fact that the delivery to the bulk plant was merely an intermediate stage in the movement of the goods to the distributor in the local market. In the *Ford Motor* case, the unfair competitive method—misleading advertising—admittedly had been disseminated through means of interstate commerce. The language cited by the Court of Appeals in this case related solely to the question of whether or not the unfair method affected competition in commerce—a question no longer relevant under the Act.[21]

Under the undisputed facts herein, it is clear that insofar

21. See *Scientific Manufacturing Co.* v. *Federal Trade Commission*, 124 F. 2d 640, 642-3 (C. A. 3, 1941).

as petitioner's business is concerned, interstate commerce ended at its warehouses and subsequent transactions relating to those goods were intrastate and outside the jurisdiction of the Federal Trade Commission.

3. Precisely as in *Bunte Bros.*, this case involves "an important aspect of the interplay of state and federal authority."[22] The decision below affects a vast extension of of the authority and jurisdiction of the Commission into "myriads of local businesses,"[23] and a like deprivation of local government's power to deal with local matters.

The question is one which effects the day-to-day business of the Commission, and one which the Commission itself has conceded "* * * is a question of importance in the administration of the Federal Trade Commission Act."[24] The decision below of necessity involves all "in commerce" statutes, and the authority of all agencies which derive their powers under such statutes. The decision must necessarily affect all of those companies which engage in both interstate and intrastate activities and, indeed, all of the innumerable retail establishments which receive through interstate channels the goods and wares in which they deal.

4. The questions presented by this petition are "fundamental to the further conduct of the case." *United States v. General Motors Corporation*, 323 U. S. 373, 377; *Land v. Dollar*, 330 U. S. 731, 734, n. 2; *Larson v. Domestic & Foreign Commerce Corp.*, 337 U. S. 682, 685, n. 3. A reversal of the court below would dispose of the case, and a modification would serve to guide further proceedings below.

The issues are clear-cut, arise only upon the Com-

22. 312 U. S. at p. 350.

23. 312 U. S. at p. 354.

24. Commission's "Motion to Fix Dates for Filing Briefs and Appendices and to Extend Date for Hearing" filed in the court below on Dec. 29, 1958, certified as a part of the record below but not reprinted here.

mission's findings, and involve none of the evidence. Upon these findings, the Commission's claim to jurisdiction must stand or fall.[25]

The court below thought the jurisdictional question of such substantiality as to warrant a special hearing in advance of a hearing on the merits below,[26] and it thought the question of such importance that it has deferred further proceedings before it until this Court shall have ruled upon this petition.[27]

If petitioner is correct in its position that the Commission's order exceeds its authority, a present review of the decision below will relieve petitioner of the hardship entailed in printing the record below (which consists of more than 8,500 pages of transcribed testimony, as well as over 400 exhibits) and in preparing and trying the review thereof.

The questions raised by this petition are so important and far-reaching that a decision upon the question presented should not be postponed until the proceedings below can be concluded.

25. *Connecticut Light & Power Co.* v. *F. P. C.*, 324 U. S. 515, 532; *City of Yonkers* v. *United States*, 320 U. S. 685; *Florida* v. *United States*, 282 U. S. 194.

26. Appendix B, *infra*, p. 34.

27. Appendix B, *infra*, p. 37.

CONCLUSION.

For the foregoing reasons, petitioner respectfully requests that this petition for a writ of certiorari be granted.

Respectfully submitted,

STUART S. BALL,
RICHARD J. FLYNN,
11 South La Salle Street,
Chicago 3, Illinois,

ROBERT H. TRENKAMP,
R. D. BOVINGTON,
EDWARD A. McLEOD,
1675 Union Commerce Building,
Cleveland 14, Ohio,
Attorneys for Petitioner.

SIDLEY, AUSTIN, BURGESS & SMITH,
TRENKAMP & COAKLEY,
Of Counsel.

APPENDIX A.

IN THE

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

SEPTEMBER TERM, 1958. APRIL SESSION, 1959.

No. 12451

HOLLAND FURNACE COMPANY, *Petitioner,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

Petition for Review of Order of the Federal Trade Commission.

June 16, 1959

Before SCHNACKENBERG and HASTINGS, *Circuit Judges* and WHAM, *District Judge.*

WHAM, *District Judge.* Petitioner, Holland Furnace Company, a corporation, filed its petition in this court for review of a final order of the Federal Trade Commission, dated July 7, 1958, which directs Holland to cease and desist from certain practices found to be deceptive and to constitute unfair competition. Thereafter, Holland filed a motion under the provisions of Rule 15(f) of this court moving for a determination of jurisdictional issues in advance of a hearing on the merits. This motion was granted. In the motion Holland says that the Commission had no

jurisdiction to enter said final order for two reasons, namely, (1) that the findings of fact upon which said final order is based, together with the stipulated facts and documents of record, affirmatively demonstrate that the practices enumerated in the commission's order were not employed in commerce and (2) that said findings of fact are wholly inadequate to sustain the jurisdiction of the Commission in that they fail to demonstrate that the practices enumerated in the Commission's order were employed in commerce.

The Commission rests its claim to jurisdiction upon the whole case. For a proper understanding and discussion of this claim it seems essential that the substance of the pleadings, findings and conclusions in so far as they bear on jurisdiction should appear. To conserve space they appear in marginal notes.

The substance of the Commission's complaint appears in the margin.[1]

1. That Holland, a Delaware corporation with principal place of business in Holland, Michigan, is and has been engaged in the manufacture, sale and distribution of furnaces, heating equipment and parts therefor; that it owns and operates approximately 475 branch offices, located in different states of the United States, and a number of subbranches; that its products are shipped from its said plant in Michigan to the various branch offices in other states for delivery to purchasers thereof, some shipments being made before sale and some after sale; that Holland maintains and has at all pertinent times maintained a course of trade in said products in commerce among and between the various states of the United States in substantial competition with others engaged in the manufacture, interstate sale and distribution of furnaces, heating equipment and parts therefor.

Further, that Holland, to sell its product, employs salesmen and house-to-house canvassers who have received instructions, sales manuals and other material from Holland and are assigned a territory and required to make a report of each sale; that installation of equipment sold is made by Holland's servicemen.

Further, that in the course and conduct of its aforesaid business and for the purpose of selling its products Holland directly and through its representatives employs many false, unfair and deceptive practices among which are misrepresentation by the salesmen

Holland's answer.[2]

After extensive hearings before the Commission's examiner on the issues framed by the complaint and answer the examiner determined the issues in favor of the Commission and made his initial decision with his findings, conclusions and his order directing Holland, its officers, agents, representatives and employees, to cease and desist from the wrongful and deceptive practices therein found in connection with its offering for sale, sale or distribution in commerce of furnaces, heating equipment and parts therefor.

In the initial decision the examiner preliminary to his findings made this statement: "This matter being now before the Hearing Examiner for final determination based upon the record as a whole entirety, he having presided at all hearings, observed all witnesses, considered and ruled upon all testimony and exhibits of record, finds that this proceeding is in the interest of the public and hereinafter makes his findings as to the facts, conclusions drawn therefrom, and order."

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and servicemen that they are inspectors or representatives of government agencies or of gas and utility companies, or heating engineers, together with many other detailed wrongful practices all to the prejudice and injury of the public and Holland's competitors and constituting unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

2. The answer denies all allegations of unfair competition and says that it has not maintained course of trade in its products in commerce among and between the various states of the United States; that the Commission has no jurisdiction to hear or determine the matters set forth in the complaint and no jurisdiction to issue the cease and desist order therein sought for the reason that the acts and practices allegedly constituting unfair methods of competition or unfair or deceptive acts or practices in commerce as set forth therein, were not committed in commerce within the intent and meaning of the Federal Trade Commission Act. Respondent says that such acts or practices in so far as admitted and not denied, were committed in transactions which were purely local in character and were not transactions in commerce within the intent and meaning of the Federal Trade Commission Act.

The examiner's findings pertinent to the jurisdiction of the Commission appear in the margin.[3]

The examiner in his initial decision listed as issue number one: "Is the respondent engaged in interstate commerce within the purview of the Federal Trade Commission Act?" In his first conclusion the examiner said: "The

3. "1. Respondent, Holland Furnace Company, is a corporation organized under the laws of the State of Delaware with its principal place of business located at No. 489 Columbia Avenue, Holland, Michigan.

"2. Respondent is now, and has been for the past several years, engaged in the manufacture, sale and distribution of furnaces, heating equipment and parts therefor. Respondent owns and operates approximately 475 branch offices, as well also a number of subbranches, located in various states of the United States. All sales of furnaces, heating equipment and parts therefor, effected by the Holland Furnace Company or its representatives are to the ultimate purchasers and users of such equipment.

"3. In conducting its business respondent does not ship furnaces as units but, typically, sends a carload of the essential parts which are assembled either in its warehouses or branches, or 'on the job' where the furnaces are to be installed. The warehouses mentioned are, in some instances, branch warehouses, that is to say, ones which are connected with the respondent's branches, or central warehouses located at strategic points and which supply the branches in adjoining or surrounding territory. Generally speaking, a central warehouse is located in a large city and acts as a source of supply for respondent's branches located in that city and in surrounding territory. When the need arises in the branch offices for material or equipment which is not there on hand or in stock, such is ordered direct from the factory and, in the cases of small branches, the order generally goes direct to the factory rather than to a central warehouse. Respondent also sells repair and replacement parts for its equipment to independent furnace servicing concerns or individuals, which are obtainable from the branch offices. Also the branches, on occasion, exchange material between themselves when necessary, although this is not general, the branches, being under instruction to order their needs direct from the factory. The branch offices of the respondent extend throughout the United States with the exception of three or four states in the far south. Deliveries are made by respondent preferably by means of automobile trucks, such trucks not only delivering supplies to the appropriate consignees but, on return trips, haul back to the factory at Holland, Michigan, scrap metal and old equipment for recovery purposes. Where exceedingly long hauls are involved, as for in-

contentions of the respondent to the contrary notwithstanding, it is found that respondent was, at all times touched upon herein, engaged in interstate commerce as such is defined in the Federal Trade Commission Act and under the many court decisions interpretative of said Act." The examiner ordered that Holland and its "officers,

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stance from Holland to the States of Washington, Oregon, or California, deliveries may be made by railroad freight.

"This system of operation has been substantially the same since the year 1934.

• • • •

"4. Respondent maintains, and has maintained, a course of trade in its products aforesaid, in commerce among and between the various states of the United States and in the District of Columbia to such extent as to make it amenable to the jurisdiction of the Federal Trade Commission under the provisions of the Federal Trade Commission Act as 'interstate commerce' is defined in said Act.

"For a long period of time respondent operated a branch office in the City of Washington, D.C. Respondent furnished certain papers • • • showing that from the year 1936 through 1942 respondent operated a branch office in the City of Washington, D.C.; from 1943, to and including 1948, this office was designated a subbranch; during the years 1949, 1950 and 1951, this outlet reassumed its status as a branch, and from 1952 to June 30, 1954, was designated as a subbranch. The complaint in this case is dated May 4, 1954, so the foregoing constitutes an admission that respondent was operating in the Washington territory subsequent to the date of the complaint herein. Testimony shows that although respondent claims to have abandoned operations in the Washington, D.C. area it continued to do business therein through the instrumentality of its Baltimore, Maryland, branch, and that if a homeowner in this area had a Holland furnace which needed parts and wrote to the respondent at its home office, the latter would refer the inquiry to the nearest branch, which in this instance would be Baltimore, Maryland, which branch would first dispatch a salesman to ascertain exactly what was needed, and upon determination thereof an agreement would be executed and the material would be delivered through the Baltimore Branch.

"The respondent's manager of the Baltimore branch testified that sales are made in the Washington area through the Baltimore branch and that equipment is delivered in Washington from Baltimore by means of the respondent's own truck, or by the trucks of their mechanics; that the Holland Furnace Company has a Washington telephone number with the calls thereon being taken by a so-called 'answering service' and relayed to the Baltimore office, and that this telephonic arrangement was in effect in the Baltimore branch when this particular manager took over; that the Balti-

agents, representatives, and employees, * * * * in connection with the offering for sale, sale or distribution in commerce, as 'commerce' is defined in the Federal Trade Commission Act, of furnaces, heating equipment, or parts therefor, do forthwith cease and desist from" various designated representations, misrepresentations and acts which

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more branch does not at present have a subbranch in Washington, D.C.; that he had handled complaints from the Washington area and had been instrumental in resolving such complaints.

"There are also of record twelve exhibits which show actual sales of respondent's equipment and repair services through the instrumentality of the Washington, D.C. office, in the States of Virginia and Maryland, as well also in the District of Columbia; there is also an exhibit of record showing a sale from an Indiana branch of respondent to an Illinois customer.

"The exhibits * * * * show the locations of respondent's eleven central warehouses and its numerous branch and subbranch warehouses strategically located throughout the United States, while a glance at a map of the United States, prepared by respondent, will disclose its widespread, nation-wide, activities which have enabled it to effect gross annual sales which, according to one witness, has reached $30,000,000.00. * * * * * a quotation from the 1952 Annual Report of the corporation over the signature of its President, 'by order of the Board of Directors' is revealing:

> "'As you may possibly know, your company is the only manufacturer in the heating industry which retails. The public cannot buy heating equipment direct from any other factory—only from dealers who sell under their own names. Our branch system throws the complete responsibility for all the actions of its personnel as well as the functioning of its equipment, directly upon the company. * *'

"The said report then goes on to point out:

> "'Clearly, our 15,000,000 customers have found this policy gratifying.'

* * * *

"5. Respondent is now, and has been at all times herein mentioned, in substantial competition with other persons, firms and corporations engaged in the manufacture, sale and distribution of furnaces, heating equipment, and parts therefor. While respondent admits the charge of competition, it denies that such competition took place in interstate commerce. The fact that the respondent has been engaged in interstate commerce having been specifically found to be true in the preceding finding, it is not felt necessary to analyze further the testimony of record in support of this finding.

* * * * *"

the examiner had found to be unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce.

Holland appealed to the Commission from the initial decision and order of the examiner. After hearing, the Commission rendered its opinion and entered a final order adopting as its own the hearing examiner's initial decision, including its findings, conclusions and order.

The pertinent language used by the Commission in its opinion appears in the margin.[4]

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4. "The record discloses Holland owns and operates some 475 branch offices, or retail outlets, as well as a number of subbranches. Salesmen or house-to-house canvassers sell respondent's products with gross annual sales amounting to about $30 million. All sales effected by the Holland Furnace Company or its representatives are to the ultimate purchasers and users of such equipment. Respondent does not ship furnaces as units but sends quantities of essential parts to central or branch warehouses * * * *

"* * * * The heating equipment involved is manufactured in Holland, Michigan, and shipped from there and sold by respondent's authorized representatives on a nationwide basis in some forty-five states through Holland's own retail outlets. * * *

"Contracts between respondent and branch managers and salesmen; correspondence between the home office in Michigan and field personnel; those contracts between respondent's salesmen and a purchasing public on respondent's behalf which must be accepted by the home office; and representations made by salesmen in selling respondent's products—all are part and indicate a pattern of conduct in commerce within the meaning of the Federal Trade Commission Act.

"Furthermore, there is record evidence that sales were made from respondent's Baltimore, Maryland, branch in the District of Columbia and in Virginia; that the Niles, Michigan, branch sold in Indiana; that the South Bend, Indiana, branch sold in Michigan; Missouri branches sold in Illinois; and Kentucky branches sold in Ohio. * * * * The fact that respondent's products are shipped to respondent's employees at its branch warehouses for subsequent delivery to purchasers does not put an end to the interstate character of the transaction."

"These salesmen and solicitors are Holland's agents whose function is to solicit and to consummate sales in the several states. If sales are not made no goods move from Michigan to the other states in which Holland does business. Thus the salesmen and solicifors

To clarify the issues and make clear the positions of the respective parties, excerpts from their briefs appear in the margin.[5]

The controlling legislation is found in paragraphs (1) and (6) of Sec. 5(a) (15 U. S. C. A. Sec. 45(a)(1) and (6)) of said act which read:

> "(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful."
>
> "(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations * * *

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are an integral and vital part of Holland's interstate sales promotion. * * * *

* * * * *

"It is our position, of course, that the warehousing of goods in the several states is but an incident of Holland's business and in no way changes the character of the activities engaged in by its solicitors and salesmen. Moreover, it appears that Holland actually ships goods between the branches in fulfillment of contracts and when contracts are negotiated the branches may even secure delivery of the necessary parts directly from Holland. * * *"

5. In its brief Holland says: "For the purposes of this motion, it must, of course, be assumed that Holland committed the acts and engaged in the practices alleged as found by the Commission. The sole question now before this court is, assuming that Holland did engage in such unfair and deceptive practices, was it within the jurisdiction of the Federal Trade Commission to order Holland to cease and desist from such practices?

* * * * *

"Corporations such as Holland, which are engaged in a multistate business and which ship products to branches, necessarily engage in both interstate and intrastate commerce. While the Federal Trade Commission may have jurisdiction with respect to interstate operations, under the terms of the Act, the Commission has no jurisdiction whatsoever with respect to unfair or deceptive practices used in the intrastate operations of an interstate corporation."

The Commission's brief says. "The sole contested issue is: Whether the Commission correctly concluded that, upon the facts as set forth in the pleadings, the initial decision, and the opinion of the Commission, the methods, acts and practices of Holland Furnace Company which are the subject of this proceeding, are methods of competition in commerce, and acts and practices in commerce, within the coverage of Section 5(a)(1) of the Federal Trade Commission Act.

* * * * *

from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

The quoted sections of the statute plainly disclose that the reach of the act is controlled and limited by the phrase "in commerce". That the statute should not be applied to transactions which are not "in commerce" was declared in the case of *Federal Trade Commission* v. *Bunte Bros., Inc.*, 312 U. S. 349. The court said:

> "This case presents the narrow question of what Congress did, not what it could do. And we merely hold that to read 'unfair methods of competition in (interstate) commerce' as though it meant 'unfair methods of competition in any way affecting interstate commerce,' requires, in view of all the relevant considerations, much clearer manifestation of intention than Congress has furnished."

By its decision the Supreme Court affirmed this court which in disposing of the same question in the same case had said:

> "The only practices with which the Commission may concern itself are transactions 'in interstate commerce.' * * * The words, the meaning of which we are to construe, are definitely 'in commerce' not 'affecting interstate commerce.'
>
> * * * * *
>
> * * * If an extension of the Federal Trade Commission's jurisdiction be advisable so as to include practices affecting interstate commerce, it is for Congress, not the court to make the change."
>
> *Bunte Bros., Inc.* v. *Federal Trade Commission*, 7 Cir., 110 F. 2d 412.

Holland concedes that it is engaged in interstate commerce but claims that it is also engaged in intrastate commerce and that all acts of unfair competition and deception by its salesmen and servicemen found by the Commission

were committed in the intrastate phase of its business. This contention is based on the claim that all of its sales, distribution and installations are made within any given state subsequent to the time when its products have come to rest in its warehouse or warehouses in such state and are no longer in interstate commerce. This claim seems to be refuted in part, at least, by the findings that Holland made sales in the District of Columbia through a branch and subbranch located in said District over a period of many years and through a subbranch from 1952 to June 30, 1954, and made other sales therein through the Baltimore, Maryland, branch; made other sales of respondent's equipment and repair service through the instrumentality of the Washington, D. C. office in the states of Virginia and Maryland, as well as in the District of Columbia; that the Niles, Michigan, branch sold in Indiana; that the South Bend, Indiana, branch sold in Michigan; Missouri branches sold in Illinois and Kentucky branches sold in Ohio; also, a sale from an Indiana branch of respondent to an Illinois customer. Though these particular findings of interstate transactions may be applicable to a comparatively small portion of the vast operations conducted by Holland they seem sufficient to negative Holland's contention that the Commission under its findings, is wholly without jurisdiction. Whether or not the findings just mentioned are sufficient to uphold an order by the Commission to cease and desist requires a consideration of the merits and from this we refrain.

After due consideration of the principles declared in Bunte and other applicable decisions we are of opinion that under the facts found by the Commission, as hereinbefore set out, the Commission was correct in its holding that it had jurisdiction in the case. We hold as did the Commission that the acts, representations and conduct of Holland's employees in selling and distributing Holland's furnaces and parts, whether before or after such products had been

warehoused in the state where sold and distributed, were in commerce within the meaning of the Federal Trade Commission Act." In its opinion the Commission said, correctly we think:

> "* * * The heating equipment involved is manufactured in Holland, Michigan, and shipped from there and sold by respondent's authorized representatives on a nationwide basis in some 45 states through respondent's own retail outlets. A realistic view of respondent's activities in moving its products from Michigan across state lines to accomplish its stated purpose of direct sales to ultimate consumers through 500 Direct Factory Branches serving Over 15,000,000 Customers' admits of no other conclusion than that respondent is engaged 'in commerce.'
>
> "Contracts between respondent and branch managers and salesmen; correspondence between the home office in Michigan and field personnel; those contracts between respondent's salesmen and the purchasing public on respondent's behalf which must be accepted by the home office; and representations made by salesmen in selling respondent's products—all are part and indicate a pattern of conduct in commerce within the meaning of the Federal Trade Commission Act."

In making the foregoing statements the Commission had before it the evidence that in its 1952 Annual Report Holland asserted to its stockholders:

> "* * * The public cannot buy heating equipment direct from any other factory—only from dealers who sell under their own names. Our branch system throws the complete responsibility for all the actions of its personnel, as well as the functioning of its equipment, directly upon the company. * * * *
>
> * * * * * *
>
> "Clearly, our 15,000,000 customers have found this policy gratifying."

Under the policy and practice found by the Commission there seems to be no logical point between shipments from

the State of Michigan and the sale and delivery of Holland's products through its employees to the ultimate consumer in another state when, in view of the provisions and purposes of the Federal Trade Commission Act, they cease to be in interstate commerce until they rest finally in the possession of the purchaser or ultimate consumer. Without the sales, deliveries and installations made by Holland's salesmen and servicemen from its own warehouses its interstate business would cease. With those sales, deliveries and installations and, measured by them Holland has a continuous interstate business reaching into forty-four states. Under such facts the temporary warehousing of the products in each separate state in Holland's own warehouses is but an incident in its interstate business. The work of Holland's salesmen and servicemen create and are an essential part of Holland's vast interstate business and therefore is in commerce and subject to the regulative powers of the Commission.

Holland urges the case of *Federal Trade Commission* v. *Bunte Bros., Inc., supra*, as decisive here in its favor. We find it to be clearly distinguishable. In that case, quite contrary to this, the unfair methods of competition sought to be regulated by the Commission were admittedly confined to activities wholly within the State of Illinois relating to goods manufactured in Illinois and which had been at no time in interstate commerce. In the case here the goods were manufactured in Michigan and shipped from that state into at least forty-four other states to be sold and distributed by the manufacturer's own agents and employees to the ultimate consumers.

Holland cites and relies strongly on the case of *Ward Baking Co.* v. *Federal Trade Commission*, 264 Fed. 330. In that case Ward hauled bread in trucks from one state into another where by means of unfair sales methods, it sold the bread from its trucks to local purchasers. The court

held that the sales were local and for that reason the unfair sales methods were beyond the reach of the Federal Trade Commission. It is observed that the court based its conclusion that the sales from Ward's trucks were not in commerce within the meaning of the Federal Trade Commission Act upon the authority of a Supreme Court case relating to alleged interference with interstate commerce by local taxation. *Wagner* v. *City of Covington*, 251 U. S. 95. Though the factual situations were similar in the *Wagner* and *Ward* cases, entirely different statutes were being applied and the legal principles which were applicable in *Wagner*, a tax case, were different from those which were properly applicable in the *Ward* case under the Federal Trade Commission Act. In view of later cases hereinafter discussed we believe that Ward is entitled to little weight here.

Other Federal Trade Commission cases cited by Holland such as *Canfield Oil Co.* v. *Federal Trade Commission*, 274 Fed. 571; *Winslow* v. *Federal Trade Commission*, 277 Fed. 296 and *California Rice Industry* v. *Federal Trade Commission*, 102 F. 2d 716, have been examined and found to be distinguishable on facts. The same is true of *Ewing-Von Allmen Dairy Co.* v. *C and C Ice Cream Co.*, 109 F. 2d 898; *Lawson* v. *Woodmere*, 217 F. 2d 148 and *Brosius* v. *Pepsi-Cola Co.*, 155 F. 2d 99, which were Sherman Anti-trust cases. We have also examined *Walling* v. *Goldblatt*, 7 Cir., 128 F. 2d 778; *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564 and *Higgins* v. *Carr Bros. Co.*, 317 U. S. 572, Fair Labor Standards Act cases which are not only distinguishable factually but because the purpose of the statute being applied in those cases is essentially different from the purpose of the Federal Trade Commission Act.

Though the Commission has cited no authority precisely in point, there are cases with facts sufficiently sim-

ilar to make the holdings therein persuasive if not completely authoritative in support of the Commission's jurisdiction. The nearest in point is *Standard Oil Co.* v. *Federal Trade Commission*, 340 U. S. 231, which went from this court, 173 F. 2d 210, to the Supreme Court. In that case Standard received interstate shipments of crude oil for refining at its refinery at Whiting, Indiana. A portion of the gasoline so produced was shipped by tankers on the Great Lakes from Whiting to Standard's marine terminal at River Rouge, Michigan, and was there stored in bulk where it remained for varying periods under ownership by Standard until sold and delivered to its customers in the Michigan area, including Detroit. In the autumn sufficient gasoline was stored to meet winter demands. The gasoline was not taken to River Rouge pursuant to orders already taken, though the demands of the Michigan territory were fairly constant, and the customers' demands could be accurately estimated. The court said: "Such temporary storage of gasoline as occurs within the Detroit area does not deprive the gasoline of its interstate character. *Stafford* v. *Wallace*, 258 U. S. 495." That the case involved price discriminations under and in violation of Sec. 2(a) of the Clayton Act, as amended, 15 U. S. C. A. Sec. 13, does not affect the question of interstate commerce within the meaning of the Federal Trade Commission Act.

In the same case this court speaking of *Stafford* v. *Wallace*, 258 U. S. 495, as being analogous said:

> "In that case, the livestock came by carrier interstate and intrastate into the receiving pens of the stockyards where the animals were fed, watered, and held until sales were consummated, either to the packers who drove them across the street to the packing house, or to the wholesale dealers or feeders who reshipped them. The transportation was broken at the yards. The animals came to rest, but the stream of commerce moved on to final destination; and the

stockyards, with its holding pens, was held to be in commerce, just as here the various changes in the manner of movement may have slowed down the stream of commerce between Whiting and Michigan, but never stopped it. The tanks at River Rouge were similar to a 'packing house' on the way to market. The tank cars and trucks were the most convenient 'packages' that could be used to complete the distribution of the gasoline. It is unlike *Walling* v. *Goldblatt Bros.*, 7 Cir., 128 F. 2d 778, where the warehouse was only a detached stockroom for retail stores of a retailer. There the stream of commerce ended at the warehouse for the most part. Here it reached at River Rouge only an intermediate stage preliminary to its final disposition to the petitioner's customers.

"We decline, as the Supreme Court did in *Stafford* v. *Wallace*, *supra*, 258 U. S. at page 519, 42 S. Ct. at page 403, 66 L. Ed. 735, 23 A. L. R. 229, '• • • to defeat this purpose in respect of such a stream and take it out of complete national regulation by a nice and technical inquiry into the noninterstate character of some of its necessary incidents and facilities, when considered alone and without reference to their association with the movement of which they were an essential but subordinate part.'"

Holland argues earnestly that its warehouses and subsequent retail sales therefrom are different from the storage facilities of Standard at River Rouge and its deliveries therefrom to its distributors in Michigan. Yet, on principle there is no dissimilarity in so far as the application of the Federal Trade Commission Act is concerned. In the Standard case the Federal Trade Commission exercised power over local sales made by Standard from gasoline in storage which had been shipped from another state and here the Commission seeks to exercise its power over local sales by Holland which are filled from storage of products owned by Holland and shipped

by it from another state. In each case the interstate commerce was wholly dependent on the sales made subsequent to storage in connection with which unfair and deceptive practices were used and kept moving through estimates of future needs created by said sales. To hold that such unfair and deceptive practices were beyond the regulatory powers of the Federal Trade Commission because of such temporary storage would be to permit a "technical legal conception" to destroy a "practical one drawn from the course of business." *Swift & Co. v. United States*, 196 U. S. 375, 398.

The case of *Ford Motor Company* v. *Federal Trade Commission*, 120 F. 2d 175, cert. den. 314 U. S. 668, is closely in point. Ford was ordered to cease and desist from using a misleading financing plan and advertisement in connection with installment sales of its cars through local dealers who had purchased the cars from Ford for resale locally. Ford filed petition for review of the Commission's order. The court having found that such dealers were aided in promoting such resales through use of the unfair financing plan and misleading advertising and that they constituted unfair competition said:

> "All of those things which stimulate or decrease the flow of commerce, although not directly in its stream, are essential adjuncts thereto and the Congress has power to confer on the Federal Trade Commission their regulation."

Citing *Stafford* v. *Wallace*, *supra*. The court said further:

> "The sale on credit of petitioner's cars by its local dealers, when separately considered may be intrastate in character but when the activities of petitioner's local agencies are weighed in the light of their relationship to the petitioner, and its financing sales of cars, it is at once apparent that there is such a close and substantial relationship to interstate commerce that the control of such activities is appropriate to its protection."

Among other cases found helpful in defining the jurisdiction of the Federal Trade Commission are *General Motors Corp., et al. v. Federal Trade Commission*, 114 F. 2d 33, cert. den. 312 U. S. 682; *Progress Tailoring Co. v. Federal Trade Commission*, 153 F. 2d 103; *International Art Co. v. Federal Trade Commission*, 109 F. 2d 393; *Federal Trade Commission v. Standard Education Society*, 302 U. S. 112; *Consumers Home Equipment Co. v. Federal Trade Commission*, 164 F. 2d 972; *Goodman v. Federal Trade Commission*, 244 F. 2d 584; *Federal Trade Commission v. Hoboken White Lead & Color Works, Inc.*, 67 F. 2d 551; *Carter Carburetor Corporation v. Federal Trade Commission*, 122 F. 2d 722.

Our study of the cases showed that seldom were two cases found relating to the jurisdiction of the Federal Trade Commission in which the facts were alike and we were impressed by the truth of the statement in more than one opinion that each case must be ruled by its own particular facts.

In the light of *Standard Oil Co. v. Federal Trade Commission, supra; Ford Motor Co. v. Federal Trade Commission, supra;* and the authorities subsequently mentioned it seems plain that the local sales by Holland through its own employees, filled from Holland's warehouses to which its products were shipped in interstate commerce prior to such sales, have such close and substantial relation to interstate commerce as to bring them within the regulative powers and jurisdiction of the Federal Trade Commission. We hold that the findings of the Commission herein adequately support its jurisdiction and that Holland's contentions to the contrary are without merit.

Holland's motion to vacate the Commission's order on jurisdictional grounds is denied.

APPENDIX B.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Thursday, December 18, 1958.

Before

Hon. Elmer J. Schnackenberg, Circuit Judge.
Hon. John S. Hastings, Circuit Judge.

No. 12451

Holland Furnace Company, *Petitioner,*
vs.
Federal Trade Commission, *Respondent.*

Petition for Review of an Order of the Federal Trade Commission.

On consideration of petitioner's "Motion for Determination of Jurisdictional Issues in Advance of Hearing on Merits" and brief in support thereof; respondent's answer to such motion and written argument in support thereof; and petitioner's reply to respondent's answer.

It Is Ordered, that petitioner's motion be granted and that, pursuant to Rule 15(f) of the rules of this court, this appeal be set for hearing on Wednesday, February 4, 1959, at 9:30 a.m., limited to a determination of the jurisdictional issues raised by petitioner's motion, in advance of hearing on the merits.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Tuesday, June 16, 1959.

Before

Hon. Elmer J. Schnackenberg, Circuit Judge.
Hon. John S. Hastings, Circuit Judge.
Hon. Fred L. Wham, District Judge.

Holland Furnace Company, *Petitioner*, vs. Federal Trade Commission, *Respondent*.	Petition for Review of an Order of the Federal Trade Commission.
No. 12451	

This matter came before the Court on petitioner's motion for determination of jurisdictional issues in advance of hearing on the merits, the answer of respondent thereto, and petitioner's reply to respondent's answer, briefs on behalf of the parties, and oral argument having been had,

It Is Ordered and adjudged by this Court that petitioner's motion to vacate order of the Federal Trade Commission on jurisdictional grounds be, and the same is hereby, Denied, in accordance with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Friday, August 14, 1959.

Before

Hon. John S. Hastings, Circuit Judge.
Hon. Elmer J. Schnackenberg, Circuit Judge.
Hon. Fred L. Wham, District Judge.

No. 12451

Holland Furnace Company, *Petitioner,*
vs.
Federal Trade Commission, *Respondent.*

Petition for Review of an Order of the Federal Trade Commission.

It Is Hereby Ordered by the Court that the petition of counsel for petitioner herein requesting the Court for a rehearing of its order heretofore entered on June 16, 1959, be, and the same is hereby, Denied.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Friday, September 4, 1959.

Before

Hon. John S. Hastings, Chief Judge.
Hon. Elmer J. Schnackenberg, Circuit Judge.
Hon. Fred L. Wham, District Judge.

Holland Furnace Company, *Petitioner*, vs. Federal Trade Commission, *Respondent*.	Petition for Review of an Order of the Federal Trade Commission.
No. 12451	

On consideration of motion of Holland Furnace Company, a corporation, petitioner, filed August 20, 1959, to extend the time for filing petitioner's brief and printed appendix thereto until thirty days after the United States Supreme Court shall have acted upon petitioner's petition to the United States Supreme Court for a writ of certiorari, under 28 U. S. C., Section 1651(a), directed to the decision of this court upon petitioner's motion for determination of jurisdictional issues in advance of the hearing on the merits; and it appearing that counsel for respondent does not oppose said motion,

It Is Ordered that said motion be and the same is hereby granted.

FILE COPY

Office-Supreme Court, U.S.
FILED
DEC 11 1959
JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1959

HOLLAND FURNACE COMPANY, *Petitioner*

v.

FEDERAL TRADE COMMISSION

ON PETITION, AND ON MOTION FOR LEAVE TO FILE PETITION, FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

ROBERT A. BICKS,
Acting Assistant Attorney General,

RICHARD A. SOLOMON,
HENRY GELLER,
Attorneys,
Department of Justice,
Washington 25, D. C.

DANIEL J. MCCAULEY, JR.,
General Counsel,

ALAN B. HOBBES,
Assistant General Counsel,
Federal Trade Commission,
Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

Nos. 520, 491 Misc.

HOLLAND FURNACE COMPANY, *Petitioner*

v.

FEDERAL TRADE COMMISSION

ON PETITION, AND ON MOTION FOR LEAVE TO FILE PETITION, FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 17-33) is reported at 269 F. 2d 203. The opinion of the Federal Trade Commission (App. 59-65)[1] has not yet been reported.

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[1] "App." refers to petitioner's appendix in the court below.

JURISDICTION

The interlocutory order of the court of appeals which petitioner seeks to review was entered on June 16, 1959 (Pet. 35), and a petition for rehearing was denied on August 14, 1959 (Pet. 36). In No. 520, the petition for a writ of certiorari was filed on November 10, 1959; the jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). In No. 491 Misc., the motion for leave to file petition for an extraordinary writ of certiorari was filed on November 19, 1959; the jurisdiction of this Court is invoked under 28 U.S.C. 1651(a).

QUESTION PRESENTED

Whether the court of appeals correctly held that, on the particular facts of this case, certain competitive practices of petitioner, found by the Federal Trade Commission to be unfair, were "in commerce" within the coverage of Section 5 of the Federal Trade Commission Act.

STATUTES INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 52 Stat. 111, 66 Stat. 632, 15 U.S.C. 45, provides in part as follows:

> Section 5 (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.
>
> * * *
>
> (6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.
>
> * * *

Section 4 of the same Act, as amended, 15 U.S.C. 44, provides in pertinent part:

* * *

> 'Commerce' means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

* * *

STATEMENT

Petitioner manufactures furnaces, heating equipment, and parts therefor at its factory in Holland, Michigan (App. 60). It sells these products directly to members of the public in their homes, through its 475 branch offices (and connecting warehouses) in 45 states (*ibid.*). Its salesmen or house-to-house canvassers work in territories assigned to them by petitioner under terms of employment fixed by contract with petitioner (App. 61). All sales contracts procured by these salesmen must be submitted to the home office for approval, the customer being expressly informed that the contract "is subject to acceptance by the General Office of the Seller at Holland, Michigan" (App. 15, 61). Salesmen may accept partial or full payment or submit a contract to petitioner for approval of extending credit (App. 77); payments on such a contract may be made "at the Seller's General Office" or at a branch office designated in the contract (App. 15).

Petitioner does not ship furnaces as units but sends carloads of esential parts to central or branch warehouses (App. 60, 72-73). After a sale, the product sold is delivered to the customer's home from the nearest

branch office or warehouse, and installed (App. 73, 77). These warehouses or branches are usually in the same states as the place of sale, but in numerous instances delivery was made from a branch or warehouse in a neighboring state (App. 61). When a sale involves equipment which is not in stock in a branch office, the equipment is ordered directly from the factory (App. 73).

The Commission proceedings. The Commission issued a complaint in 1954 charging that petitioner had engaged in unfair and deceptive acts and practices and unfair methods of competition in commerce, in violation of Section 5 of the Federal Trade Commission Act (App. 5). After full administrative proceedings, the Commission, adopting the initial decision of the examiner (App. 65-114), found that the charges of the complaint had been established,[2] and issued a cease and desist order (App. 58). The Commission rejected petitioner's argument that its sales from the branch offices "are removed from the flow of interstate commerce" (App. 60). It stated (*ibid.*) that a "realistic view of [petitioner's] activities in moving its products from Michigan across state lines [is that it is] to ac-

[2] The Commission found that petitioner's illegal actions, which were "part of a systematic sales plan effectuated by means of false representations" (App. 59), include "a sales scheme * * * whereby its salesmen gain access to homes by misrepresenting themselves as official 'inspectors' and 'heating engineers' and thereafter dismantling furnaces on the pretext that this is necessary to determine the extent of necessary repairs" (App. 59, 84-86); the use of coercive and "scare tactics" (App. 59, 77-83); representing that salesmen with no engineering training are "engineers" (App. 88-92); refusing to reassemble dismantled furnaces upon the false pretext that they are defective and dangerous (App. 92-97); and refusing to reassemble such dismantled furnaces except upon the owner's execution of a release of petitioner and its employees from liability (App. 97-98).

complish its stated purpose of direct sales to ultimate consumers through '500 Direct Factory Branches * * *,'" and it specifically held (App. 61) that

> Contracts between respondent and branch managers and salesmen; correspondence between the home office in Michigan and field personnel; those contracts between respondent's salesmen and the purchasing public on respondent's behalf which must be accepted by the home office; and representations made by salesmen in selling respondent's products—all are part and indicate a pattern of conduct in commerce within the meaning of the Federal Trade Commission Act.

The court of appeals proceedings. After filing its petition for review, petitioner, pursuant to Rule 15(f) of the rules of the court below, moved for determination of the "commerce" issue in advance of the hearing on the merits. The court granted the motion (Pet. 34) and, after briefing and oral argument of that issue, upheld the Commission (Pet. 35). Pointing out that "each case must be ruled by its own particular facts" (Pet. 33), the court rejected petitioner's "claim that all of its sales, distribution and installations are made within any given state subsequent to the time when its products have come to rest in its warehouse or warehouses in such state and are no longer in interstate commerce" (Pet. 26). It stated (Pet. 28) that "the sales, deliveries and installations made by Holland's salesmen and servicemen from its own warehouses * * * are an essential part of Holland's vast interstate business"; and that "the temporary warehousing of the products in each separate state in Holland's own warehouses is but an incident in its interstate business."

ARGUMENT

Petitioner seeks direct review of an interlocutory determination by the court of appeals that, on the "particular facts" here found by the Commission, the agency correctly ruled that petitioner's unfair and deceptive acts and practices were "in [interstate] commerce." This ruling, we submit, was correct; in any event its correctness presents no issue warranting review at this preliminary stage of the proceedings, when the court of appeals has not yet determined the validity of the Commission's order.[3]

1. Contrary to petitioner's contention (Pet. 8-9), the decision below is not in conflict with *Federal Trade Commission* v. *Bunte Bros., Inc.*, 312 U.S. 349, and the court below did not, as petitioner states (Pet. 9), extend "the Commission's jurisdiction * * * to matters which are not *in* commerce, but which merely *affect* commerce" (emphasis in original). The court expressly recognized that *Bunte* precludes the application of the statute to wholly intrastate practices which merely affect interstate commerce (Pet. 25, 28), but held "as did the Commission that the acts, representations and conduct of Holland's employees in selling and distributing Holland's furnaces and parts

[3] In addition to seeking certiorari (No. 520), petitioner also seeks leave to file a petition for an extraordinary writ of certiorari (No. 491 Misc.). Since both petitions are, except for the jurisdictional allegations, identical, our arguments against review are equally applicable to both cases. The petition for leave to seek the extraordinary writ suffers from the further infirmity that petitioner has failed completely to show that this case is one of those "really extraordinary causes" for which such "drastic and extraordinary remedies" are reserved (*Ex parte Fahey*, 332 U.S. 258, 259-260). See *infra*, pp. 9-10.

whether before or after such products had been warehoused in the state where sold and distributed, were in commerce within the meaning of the * * * Act" (Pet. 26-27).[4]

The court ruled (Pet. 27) that the Commission had correctly relied on the contracts between petitioner and its salesmen; the contracts between the salesmen and the public which must be submitted to and approved by petitioner (see p. 3, *supra*; *cf. Hump Hairpin Co.* v. *Emmerson*, 258 U.S. 290, 293-294), correspondence between the home office and the salesmen, and petitioner's own assertion in a report to its stockholders that

> * * * The public cannot buy heating equipment direct from any other factory—only from dealers who sell under their own names. Our branch system throws the complete responsibility for all the actions of its personnel, as well as the functioning of its equipment, directly upon the company. * * *.

The Commission further found that petitioner knew of, and indeed participated in, these improper sales schemes (App. 77-83, 84-88, 90, 95-97), and handled complaints about them from its home office in Holland, Michigan (App. 85-86).

These findings, which petitioner does not challenge, clearly sustain the Commission's determination that

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[4] The court below also pointed out (Pet. 26) that petitioner's claims are refuted, at least in part, by the Commission findings that sales were made across state lines and within the District of Columbia (App. 61, 111). The court further held that whether these findings are sufficient to sustain the Commission's cease-and-desist order involves a consideration of the merits, and it postponed deciding that question until the merits are reached (Pet. 26).

petitioner is engaged on a nationwide basis in direct sales to the public, and that its local sales activities are, therefore, "in commerce." *Binderup* v. *Pathe Exchange, Inc.*, 263 U.S. 291; *Standard Oil Co.* v. *Federal Trade Commission*, 340 U.S. 231; *DeLoache* v. *Crowley's, Inc.*, 128 F. 2d 378 (C.A. 5). "[T]he circumstance that in the course of the process the commodity is consigned to a local agency of the distributors, to be by that agency held until delivery to the [consumer] in the same State, [does not] put an end to the interstate character of the transaction and transform it into one purely intrastate * * *. [T]he movement of the commodity * * * was merely halted as a convenient step in the process of getting it to its final destination." *Binderup* case, *supra*, p. 309.[5]

Petitioner's attempt to isolate its final sale to the consumer from its integrated interstate operations is, as the court below held (Pet. 32), "a technical legal conception" of "commerce among the States," not the "practical one, drawn from the course of business," which this Court has stressed as controlling. *Swift & Co.* v. *United States*, 196 U.S. 375, 398; see also *Stafford* v. *Wallace*, 258 U.S. 495, 518-519. Moreover, it

[5] Petitioner's reliance (Pet. 10) on the Fair Labor Standard Act cases (*Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564 and *Higgins* v. *Carr Bros. Co.*, 317 U.S. 572) is misplaced. In those cases, in which the Fair Labor Standard Act was held inapplicable to certain local activities because the "interstate commerce ceased on delivery to a local distributor" (*Standard Oil Co.* v. *Federal Trade Commission*, 340 U.S. 231, 238, n. 6), the local distributors were independent dealers, not employees of the interstate seller; and their local distribution of the products was therefore not a part of the interstate business. In the instant case, however, the "local distributors" are employees of petitioner, and their local distribution to the ultimate consumer is, as the court below held (Pet. 28), "an essential part of Holland's vast interstate business."

is well settled that the unfair competitive methods that the Act condemns need not themselves be in interstate commerce, as long as they further an interstate business that competes with other businesses. See *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U.S. 483; *Federal Trade Commission* v. *Keppel & Bro., Inc.*, 291 U.S. 304. Petitioner is clearly conducting an interstate business, with shipments, agreements with salesmen, sales contracts with customers, payments, instructions to branch offices, etc., all flowing across state lines. See *United States* v. *South-Eastern Underwriters Assn.*, 322 U.S. 533, 541. That business is in competition with others "engaged in the manufacture, sale and distribution of furnaces, heating equipment, and parts therefor" (App. 76). Plainly, petitioner's competitive position is furthered or promoted by the deceptive practices it employs in its sales to consumers. It follows that such practices are unfair methods of competition in commerce prohibited by the statute. See *Ford Motor Company* v. *Federal Trade Commission*, 120 F. 2d 175 (C.A. 6), certiorari denied, 314 U.S. 668; *cf. General Motors Corp.* v. *Federal Trade Commission*, 114 F. 2d 33 (C.A. 2), certiorari denied, 312 U.S. 682.

2. Even were the merits less clear than we believe them to be, there would still be no occasion for review at this preliminary stage of the proceedings. Petitioner admittedly is seeking review of an interlocutory ruling, which merely resolved a preliminary issue before the validity of the Commission's order has been determined. If the court below ultimately upholds the order, the "commerce" ruling may be fully reviewed in connection with any review that may be had of the final order. The arguments

which petitioner makes (Pet. 14) to justify review at this preliminary stage—the alleged importance of the ruling (but see pp. 6-9, *supra*) and the avoidance of claimed hardship in now litigating the merits—are merely the usual grounds for seeking review of interlocutory orders. They are no more persuasive here than in the numerous other cases in which this Court repeatedly has refused to review such orders.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari in No. 520, and the motion for leave to file petition for a writ of certiorari in No. 491 Misc., should be denied.

J. Lee Rankin,
Solicitor General.

Robert A. Bicks,
Acting Assistant Attorney General.

Richard A. Solomon,
Henry Geller,
Attorneys.

Daniel J. McCauley, Jr.,
General Counsel.

Alan B. Hobbes,
Assistant General Counsel
Federal Trade Commission.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

Nos. 520, 491 Misc.

HOLLAND FURNACE COMPANY,
Petitioner,

vs.

FEDERAL TRADE COMMISSION.

ON PETITION, AND ON MOTION FOR LEAVE TO FILE PETITION, FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONER'S REPLY BRIEF.

STUART S. BALL,
RICHARD J. FLYNN,
11 South LaSalle Street,
Chicago 3, Illinois,
ROBERT H. TRENKAMP,
R. D. BOVINGTON,
EDWARD A. McLEOD,
1675 Union Commerce Building,
Cleveland 14, Ohio,
Attorneys for Petitioner.

SIDLEY, AUSTIN, BURGESS & SMITH,
TRENKAMP & OAKLEY,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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If the arguments of the Federal Trade Commission, set forth by its present spokesmen, are accepted, the Federal Trade Commission will, without benefit of further legislation, have extended its jurisdiction not only to those *local* aspects of a business which merely *affect* commerce, but also to *all* aspects of businesses which conduct interstate transactions.

Prior to the decision of the court below, the Federal Trade Commission had no such jurisdiction, and, unless this Court is prepared to permit the Commission to legislate for itself, petitioner is convinced that it does not have such jurisdiction today.

At pages 8 and 9 of its Brief, the F. T. C. states:

> "Moreover, it is well settled that the unfair competitive methods that the Act condemns need not themselves be in interstate commerce, as long as they further an interstate business that competes with other businesses. *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U. S. 483; *Federal Trade Commission* v. *Keppel & Bros. Inc.*, 291 U. S. 304."

This is a grossly erroneous statement. It is precisely the contention which was rejected in *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, where the F. T. C. argued that it had jurisdiction over methods used in local sales because the local seller was thereby enabled to compete unfairly with out-of-state manufacturers (312 U. S. at 349-350). Bunte Bros. was also an "interstate business", but the determinative question there, as it is here, was whether the alleged unfair method of competition was employed *in* commerce (312 U. S. 355).

Not even the earlier *Winsted Hosiery* and *Keppel & Bros.* cases, cited by the Commission, support its statement. In *Winsted Hosiery* the deceptive labels, and in *Keppel & Bros.* the gambling devices and arrangement, were an integral part of goods shipped in interstate commerce, and this fact was determinative.

Nor do cases such as *Binderup* v. *Pathe Exchange, Inc.*, 263 U. S. 291, or *United States* v. *South-Eastern Underwriters*, 322 U. S. 533, support the conclusion that all aspects of an interstate business are "in commerce". The *Binderup* case, which arose under the Sherman Act, is wholly different factually. There, goods manufactured in one state were shipped to residents of another state pursuant to contracts through an agent residing in the same state as the ultimate recipients. Clearly then, the entire

transaction was in interstate commerce. The *South-Eastern Underwriters* case dealt with the construction of the Sherman Act and with the scope of the *federal commerce power*, neither of which is limited to matters in commerce. The other cases relied upon by the F. T. C. are similarly inapplicable.

The Commission would have the Court ignore the Fair Labor Standards Act cases such as *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, and *Higgins* v. *Carr Bros.*, 317 U. S. 572 (not to mention *Dominech* v. *Pan American Standard Brands*, 147 F. 2d 994 cited at pages 11-12 of the petition which the F.T.C. ignores). The attempted distinctions urged by the Commission are wholly without merit. In both *Jacksonville Paper* and *Carr Bros.*, the employer (i.e. the "local distributor") was engaged in interstate commerce. The question determined was whether or not particular employees of these companies were engaged in commerce. Essentially that is the question before this Court in this case. The *Dominech* case directly disposes of the contention that a distinction may be drawn on the basis of the ownership of the "local distributor", for there, as here, the local distributor was owned by the out-of-state manufacturer, and there, as here, some aspects of the business were local, and not "in commerce".

The meaning of the phrase "in commerce" is clear. The Commission is limited to preventing the use of unfair methods of competition "in commerce". Even if they are deemed unfair, the methods employed by petitioner are not "in commerce" and are not subject to the Commission's jurisdiction.

If the jurisdiction of the Commission is to be extended by the Courts, rather than by Congress, the least that those affected by such an extension are entitled to is review by this Court.

Respectfully submitted,

STUART S. BALL,
RICHARD J. FLYNN,
11 South LaSalle Street,
Chicago 3, Illinois,
ROBERT H. TRENKAMP,
R. D. BOVINGTON,
EDWARD A. MCLEOD,
1675 Union Commerce Building,
Cleveland 14, Ohio,
Attorneys for Petitioner.

SIDLEY, AUSTIN, BURGESS & SMITH,
TRENKAMP & COAKLEY,
Of Counsel.